Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1869

PETER H. BEER, ET AL.,
Appellants

versus

UNITED STATES OF AMERICA, ET AL.,

and

JOHNNY JACKSON, JR., ET AL.,
Appellees

Appeal from the United States District Court
for the Eastern District of Louisiana

MOTION TO DISMISS OR AFFIRM

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INDEX

Motion to Dismiss or Affirm 1

Question Presented 1

Statement of the Case 2

Argument 5

Conclusion 10

Certificate of Service 12

Appendix:
Memorandum Opinion and Order of the District Court (E.D.La., C.A. No. 73-1862 "D") 1a

TABLE OF AUTHORITIES

Cases:

Alexander v. Louisiana, 405 U.S. 625 (1972) 10

Carter v. Jury Comm'n., 396 U.S. 320 (1970) 10

City of Petersburg v. United States, 354 F.Supp. 1021 (D.D.C., 1972), aff'd. 410 U.S. 962 (1973) 6,8

Fortson v. Dorsey, 379 U.S. 433 (1965) 8

Georgia v. United States, 411 U.S. 526 (1973) 9

Gomillion v. Lightfoot, 364 U.S. 339 (1960) 8

Hobson v. Hansen, 269 F.Supp. 410 (D.D.C., 1967) 10

Johnny Jackson, Jr. v. Council of the City of New Orleans, (C.A. No. 73-1862 "D", U.S.D.C., E.D., La.) 4,6,10

South Carolina v. Katzenbach, 383 U.S. 301 (1966) 9

Spencer v. Cugler, 326 F.Supp. 1235 (D.N.J., 1971), aff'd. 454 F.2d 839 (8th Cir., 1970), 404 U.S. 1027 (1971) 10

Taylor v. McKeithen, 407 U.S. 191 (1972) 7

Whitcomb v. Chavis, 403 U.S. 124 (1971) 3,8

White v. Regester, 412 U.S. 755 (1973) 3,8,9

Wright v. Rockefeller, 376 U.S. 52 (1964) 8

Constitutional Provisions and Statutes:

Fourteenth and Fifteenth Amendments, Constitution of the United States. 8,9

Voting Rights Act of 1965, §5, 42 U.S.C. 1973c . . . . . passim

Miscellaneous:

New Orleans, La., Ordinance No. 5154, Mayor Council Series, May 3, 1973 2

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NO. 73-1869

PETER H. BEER, ET AL., Appellants

v.

UNITED STATES OF AMERICA, ET AL.,

and

JOHNNY JACKSON, JR., ET AL, Appellees

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16, Paragraph 1(a), 1(c) and 1(d) of the Rules of this Court, Johnny Jackson, Jr., et al, Intervenors-Appellees, move that the appeal be dismissed, or, alternatively, that the judgment of the District Court be affirmed.

QUESTION PRESENTED

Whether the District Court clearly erred in finding that Plaintiffs-Appellants failed to meet their burden of proving that their redistricting did not have the purpose and will not have the effect of abridging or denying the vote of black citizens of New Orleans in accordance with Section 5 of the Voting Rights Act of 1965, 42 U.S.C. §1973c.

STATEMENT OF THE CASE

The Council of the City of New Orleans on March 2, 1972, adopted a redistricting ordinance (Plan I), and submitted the plan to the Attorney General of the United States for the required scrutiny under Section 5 of the Voting Rights Act of 1965, supra. The Attorney General found that Plan I was racially discriminatory in purpose or effect, because it artificially and unnecessarily divided areas of black concentration without a rational basis, resulting in a larger number of white voters than black voters in each of the districts.

The City Council then adopted Ordinance No. 5154 Mayor Council Series (referred to as Plan II or the "Moreau" plan), which was only slightly different than Plan I, and submitted it to the Attorney General pursuant to Section 5. The Attorney General again interposed an objection, finding that Plan II exhibited the same type of racially discriminatory gerrymandering as did Plan I.

Six of the seven individual Councilmen of the City of New Orleans, purporting to act for the City of New Orleans, then filed suit for a declaratory judgment in the District Court for the District of Columbia, pursuant to the alternative approval provisions of Section 5. After an extensive hearing, depositions, and massive documentary evidence, the three-judge District Court unanimously held that Plan II will have the effect of abridging, on account of race or color, the right to vote in Councilmanic elections in the City of New Orleans, and denied the declaratory judgment sought by Plaintiffs.

The District Court in its lengthy Opinion (appended to Appellants' Jurisdictional Statement) determined that there were a number of independent grounds upon which the plan failed to pass Section 5 muster. Among other things, the District Court found that the delineation of the districts artificially divided areas of significant black concentration by oblong vertical districts constructed without a rational basis. Additionally, the District Court, applying the Whitcomb v. Chavis, 403 U.S. 124 (1971) and White v. Regester, 412 U.S. 755 (1973) "totality of circumstances" standard, found that the plan operates "invidiously to cancel out or minimize the voting strength" of New Orleans' black minority, and effectively cuts off their access to the political process at every level. The District Court found the political context in which Plan II was to operate, to be saturated with the debilitating vestiges of a recent history of severe official racial discrimination at every level, including the right of blacks to register and vote and participate in the democratic processes. The Court also found the political context to contain a one-party system, effectively closed to blacks; unresponsiveness of the all-white City Council to the particularized interests of the black community; the majority or run-off requirement in party primary elections, which has a propensity for submerging racial minorities; and anti-single shot voting law, which forecloses concentration of the minority vote on a single aspirant in primary elections; and at-large elections for two members of the seven-member Council, which with proven bloc voting in New Orleans, assures that

there will be a white quota of at least two members on the City Council, and that blacks are limited to vying for the five district seats, from which they are also excluded under Plan II.

In short, the District Court did not even find that this was a close case, but concluded that the abridgement of the vote on account of race under Plan II was drastic and severe.

The District Court properly found that it was not its prerogative to devise as a remedy a fair plan of redistricting, but only to deny or to grant the declaratory judgment. Assuming this limitation on Section 5 jurisdiction, your Intervenors-Appellees, Johnny Jackson, Jr., et al, immediately following the Attorney General's objection to Plan II, filed suit in the United States District Court for the Eastern District of Louisiana against the individual members of the City Council, and seeking that that Court within its equitable authority devise a racially fair plan of redistricting for the New Orleans City Council. (Johnny Jackson, Jr., et al v. Council of the City of New Orleans, et al, C.A. No. 73-1862 "D", U.S.D.C., E.D. La.). That Court on August 31, 1973, enjoined Councilmanic elections under the pre-existing malapportioned districting plan provided for in the City Charter, without opposition from the City Council. During this time, of course, Plan II could not be implemented because of the outstanding objection by the Attorney General. The District Court in the Eastern District of Louisiana had first appointed a Special Master and directed him to devise a racially fair plan

of redistricting for the City Council. However, after the instant case was set for trial, the District Court in the Eastern District of Louisiana in August of 1973 held its proceedings in abeyance pending the outcome of the instant matter in the United States District Court for the District of Columbia. On March 19, 1974, your Intervenors-Appellees as plaintiffs in No. 73-1862 "D" in the Eastern District of Louisiana, moved for reactivation and expedited proceedings, requesting that the Court direct the Special Master to devise a fair plan of redistricting under which elections for Councilmen could be conducted. On June 21, 1974, the District Court for the Eastern District of Louisiana denied plaintiffs' motion, and contined to hold its proceedings in abeyance pending a final determination by this Court. The result has been that although elections were scheduled on November 10, 1973 to elect Councilmen for the City of New Orleans, who were to take office on April 1, 1974, no Councilmanic elections have been conducted, and the present all-white City Council are retaining their offices at least until the disposition of this appeal.

ARGUMENT

This Court is asked to review and give plenary consideration to a garden variety racial gerrymander, which a unanimous three-judge District Court found to be drastically violative of Section 5 of the Voting Rights Act of 1965 on a number of independent grounds. Since this is a case that clearly should be affirmed under prior decisions of this Court, and particu-

larly in view of the action taken by the United States District Court for the Eastern District of Louisiana in Johnny Jackson, Jr., et al v. Council of the City of New Orleans, et al, supra, awaiting the decision of this Court before proceeding to order the much-overdue Councilmanic elections under a non-racially discriminatory single-member district plan of apportionment, Appellees Johnny Jackson, Jr., et al respectfully urge this Court to summarily affirm the District Court pursuant to Rule 16, Paragraph (c) and (d).

In City of Petersburg v. United States, 354 F.Supp. 1021 (D.D.C., 1972), aff'd. 410 U.S. 962 (1973), the only case similar to that at bar to reach this Court after a determination by the District Court for the District of Columbia pursuant to Section 5, this Court summarily affirmed the District Court's holding that the plaintiffs had failed to carry their burden of showing that annexation of a large white area, while retaining at-large elections for City Councilmen, does not have the purpose or effect of denying or abridging the right to vote on account of race or color, pursuant to Section 5. In the case at bar, the evidence that Plan II was in fact racially discriminatory was even more overwhelming than in City of Petersburg. The plaintiff City of Petersburg was able to urge with some force that any racially discriminatory effect was merely incidental to the City's prime goal of enlarging its boundaries, with attendant enlargement of its tax base. The City of New Orleans similarly argues that the racially discriminatory effect of its delineation of district lines is only incidental to the

accomplishment of other governmental aims. However, the evidence demonstrated and the District Court found that the alleged other governmental aims of the City of New Orleans were inconsistent, ambiguous and shifting. Specifically in regard to the City's assertion that the narrow, oblong, vertical districts were drawn to honor ward lines, the District Court found that "the ward boundaries are political anachronisms insofar as councilmanic elections are concerned, and survive merely as convenient administrative designations for groups of precincts", and that their "original function" had been "rendered obsolete". (See n.219, p. 49a-50a, Jurisdictional Statement). The District Court also found that the purported governmental aim of following ward lines had not been honored in practice by the City Council, either in the development of Plan I or Plan II. (See p. 49a, Jurisdictional Statement). The District Court further found that although the Council staff purported to follow certain governmental aims in developing the plan, Plan II "may have been as much the handiwork of councilmen as of the staff, with resultant uncertainty as to the extent that allegiance to the staff's guidelines was maintained. The evidence also discloses wide differences of opinion among the councilmen as to the relative priority and weight which the factors incorporated into the guidelines should be assigned." (P. 50a, Jurisdictional Statement). See also, Taylor v. McKeithen, 407 U.S. 191 (1972), which raised the issue of the significance, or lack thereof, of New Orleans' wards to redistricting. Certainly then, the contention of the City that the racially discriminatory effect of the plan was only

accomplishment of other governmental aims is of significantly less force than that in the City of Petersburg, supra, and accordingly, the judgment of the District Court should be affirmed summarily herein as it was in the City of Petersburg, supra.

In interpreting the Fourteenth and Fifteenth Amendments to the United States Constitution, this Court has held that racially discriminatory gerrymandering is constitutionally prohibited, Gomillion v. Lightfoot, 364 U.S. 339 (1960); Wright v. Rockefeller, 376 U.S. 52 (1964); Fortson v. Dorsey, 379 U.S. 433 (1965), and has set forth guidelines for determining the presence of constitutionally prohibited racial gerrymandering. Whitcomb v. Chavis, 403 U.S. 124 (1971) and White v. Regester, 412 U.S. 755 (1973). The District Court, applying the standards culminating in White v. Regester, supra, found that "under the totality of the circumstances", Plan II operated to minimize and cancel out the voting strength of the minority and effectively cut off their access to the political process. Under these cases, the principal problem of minorities overcoming discriminatory districting arrangements, whether it be of the ad hoc variety (delineation of district boundaries) as in Wright, supra, or the institutional variety (at-large elections, multi-member districts, and the like), as in Fortson, supra, Whitcomb, supra, and White, supra, has been in meeting the burden of proof. The facts of the case at bar, as demonstrated by the evidence and found by the District Court, would be sufficient under this line of decisions to meet the burden of proof if this were a case in which the black minority was

challenging Plan II on direct Fourteenth and Fifteenth Amendment grounds. However, since this case arises under Section 5 of the Voting Rights Act of 1965, the burden of proof is upon the Councilmen of the City of New Orleans to demonstrate that the plan does not have the purpose and will not have the effect of denying the right to vote to citizens on account of their race or color. Georgia v. United States, 411 U.S. 526, 538 (1973) and South Carolina v. Katzenbach, 383 U.S. 301, 335 (1966). Thus, under the totality of circumstances in this case, where the burden of proof is upon the Councilmen of the City of New Orleans, it is even more clear than in White, supra, that Plan II impermissibly operates to minimize and cancel out the voting strength of the minority, and denies to them access to the political process at every level. Accordingly it is manifest that the questions on which the determination of the cause depend are so unsubstantial as to not need further argument, and the Court should grant the motion to affirm. The District Court pretermitted the question of racially discriminatory purpose, having found that Plan II was clearly racially discriminatory in effect. However, it should be noted that the evidence presented below is sufficient to demonstrate that Plan II has the purpose of abridging on account of race or color the right to vote in Councilmanic elections in the City of New Orleans, and even more clearly it demonstrates that the Councilmen of the City of New Orleans fail to meet their burden of demonstrating that the plan had no such purpose. Racially discriminatory purposes are, of course, elusive. The day is gone where white public officials would openly admit on the

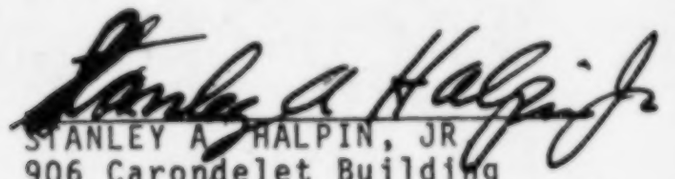
stand that their intent was to disenfranchise or discriminate against the black minority. Racially discriminatory purposes must now be gleaned from the circumstances of a particular case. See, e.g., Alexander v. Louisiana, 405 U.S. 625 (1972), (exclusion of blacks from juries); Carter v. Jury Comm'n., 396 U.S. 320 (1970); Spencer v. Cugler, 326 F.Supp. 1235 (D.N.J., 1971), aff'd 454 F.2d 839 (9th Cir., 1970), 404 U.S. 1027 (1971) (school desegregation); Hobson v. Hansen, 269 F.Supp. 410 (D.D.C., 1967). Appellees submit that the circumstances of this case, including the blatant and drastic racially discriminatory result of Plan II, the total absence of an alternative rational purpose, and the history of the City Council in adopting a prior racially discriminatory plan, are more than sufficient to warrant the legal inference that Plan II was racially discriminatory in purpose as well as in effect.

CONCLUSION

Accordingly, Appellees Johnny Jackson, Jr., et al, pray that this Court expeditiously affirm the judgment of the District Court below on grounds that it is manifest that the contentions raised by Appellants are so unsubstantial as to not need further argument, and in order that the District Court for the Eastern District of Louisiana in Johnny Jackson, Jr., et al v. Council of the City of New Orleans, et al, supra, may proceed to develop a racially fair single-member district plan of apportionment which conforms to the one man, one vote mandate, and conduct elections thereunder at the earliest practicable

date, so that the citizens of New Orleans be not further denied their right to vote for Councilmen, which has been postponed since November 10, 1973.

Respectfully submitted,



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CERTIFICATE

I, Stanley A. Halpin, Jr., Attorney for Appellees Johnny Jackson, Jr., et al and a member of the bar of the United States Supreme Court, do hereby certify that copies of the foregoing Motion to Dismiss or Affirm were mailed, first class postage prepaid, this _____ day of July, 1974, to the following counsel of record:

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JOHNNY JACKSON, JR., ET AL	NO. 73-1862
VERSUS	CIVIL ACTION
THE COUNCIL OF THE CITY OF NEW ORLEANS, ET AL	SECTION D

MEMORANDUM OPINION AND ORDER

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BOYLE, District Judge:

On the plaintiffs' unopposed motion, the Court, on August 14, 1973, entered its order in this reapportionment action staying proceedings herein pending the outcome of the case of Beer, et al v. United States of America, et al, Civil Action No.

1495-73 of the docket of the United States District Court for the District of Columbia, in which case plaintiffs here are intervenors.

The Beer case was decided adversely to the City of New Orleans by the District of Columbia Court on March 15, 1974. An appeal from that decision is pending in the Supreme Court of the United States.[1/]

1/ No. 73-1869, October Term, 1973.

On June 5, 1974 we held a hearing on the motion of the plaintiffs herein "to reactivate this case" and took the matter under advisement after allowing defendants herein five days to reply to the memorandum of counsel for movers, which was not served until shortly before the hearing. On June 6, 1974 counsel for defendants advised the Court they elected not to file any further memoranda. Having considered the record, memoranda and oral arguments of counsel and the law, we have determined that the motion should be, and the same is hereby, DENIED.

The motion under consideration, if granted, would require this Court to again set in motion procedures, which it had previously initiated before the aforesaid stay was sought and

granted, looking toward confection of a constitutional judicial plan of reapportionment of the New Orleans City Council.

The plaintiffs urge that this case should proceed in order that the election machinery may be geared and put in motion for the holding of an election under a judicial plan of redistricting in order to obviate further delay in citizens exercising their franchise privileges in selection of councilmen. Since August 14, 1973 this Court and this litigation have not proceeded in that direction because the plaintiffs, who have sued individually and on behalf of all registered voters, as a class, asked that the case not proceed.

The motion under consideration, and the opposition thereto, poses the question of whether we should, at this time and under all of the circumstances now existing, proceed to develop and decree a plan of redistricting and then order an election thereunder. The answer to that question has required consideration of many factors and, after having given the matter careful consideration, we concluded the answer should be in the negative.

The so-called "Moreau Plan", found by the Attorney General

of the United States and the District of Columbia Court not to pass muster under Section 5 of the Voting Rights Act of 1965 (42 U.S.C. 1973(c)), is a legislatively adopted plan of reapportionment. Before that Plan could be implemented, Section 5 required submission of it to the Attorney General of the United States for review or for review by a Three Judge Federal District Court for the District of Columbia. But review by the three judge court prior to implementation of the Plan would have been unnecessary if the Attorney General, upon his consideration of the Plan, had not interposed any objection to the Plan. However, such an objection was lodged. Hence, review and approval by the District of Columbia Court was necessary before the Plan could be made effective for the calling and holding of councilmanic elections.

Section 5 provides for appeal from the judgment of the District of Columbia Court to the Supreme Court of the United States.

The Congress, while recognizing the importance of the right to constitutional representation of all citizens, also recognized that procedures must be provided by which proponents

and opponents of covered apportionment plans may have due process. Due process,and appeal is a part thereof, involves delay, but we believe it was the intent of Congress that legislative reapportionment efforts which can gain the required approval should be given priority.

The Supreme Court has recognized that the legislative body of a governmental unit has the duty and task to reapportion according to federal constitutional standards. Its jurisdiction in such matters is primary and courts should not preempt the legislative task. See White v. Weiser, _____ U.S. _____, 93 S.Ct. 2348, 2354-55 (1973).

The appeal now pending in the Supreme Court of the United States appears to involve, among others, the issue of whether election of councilmen-at-large satisfies constitutional requirements. A final decision on that issue would have great bearing on the type of redistricting plan which this Court may be called upon to develop and order into effect.

Unquestionably, the right of the citizenry to elect councilmen should not be unnecessarily delayed and it cannot be disputed that federal courts have the power to devise plans

of reapportionment and order elections held thereunder at appropriate times and in appropriate cases.

However, until the City of New Orleans has had its day in the Supreme Court, we should not proceed here. Should the Supreme Court reverse the trial court, it appears this litigation may be mooted and elections could proceed without the possible delays which might be encountered because of appeals from and review of any judgment we may render. Even were we to proceed to develop and decree a judicial plan, likely appeals by non-prevailing parties could again enforce delays in holding elections.

Plaintiffs' motion to stay proceedings herein states, as a basis therefor, the following:

> ". . . such action by this Court holding its proceedings in abeyance would be appropriate in order to avoid possible conflicts between this Court and the United States District Court for the District of Columbia, and to avoid the possibility of double elections for members of the city council at considerable added expense to the people of New Orleans."

The possibility of conflict still exists, as does the

possibility of double elections at considerable added expense 2/ to the people of New Orleans, if we were to proceed at this time.

2/ We were told on hearing of the motion that the election cost to the City of New Orleans would approximate $100,000.00. Candidates' campaign expenses would undoubtedly be substantial.

/s/ Edw. J. Boyle, Jr.
UNITED STATES DISTRICT JUDGE

New Orleans, Louisiana
June 21, 1974